No. 06-486

SUPREME COURT, U.S.
DEC 6 - 2006
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IN THE

Supreme Court of the United States

LOG FURNITURE, INC. and CARI ALLEN,

Petitioners,

v.

STEVEN CALL; RAY, QUINNEY & NEBEKER; GRANITE STONE, L.C.; MACHINERY HARDWARE & SUPPLY, INC.; and DAVID HARRIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

RICHARD D. BURBIDGE
STEPHEN B. MITCHELL
BURBIDGE & MITCHELL
215 South State Street
Suite 920
Salt Lake City, UT 84111
(801) 355-2341

Attorneys for Steven Call, and Ray Quinney & Nebeker P.C.

STEVEN T. WATERMAN*
RAY QUINNEY & NEBEKER P.C.
36 South State Street
14th Floor
Salt Lake City, UT 84145-0385
(801) 532-1500

Attorneys for Granite Stone, L.C., Machinery & Hardware Supply, Inc., and David Harris

* *Counsel of Record*

205249

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition where the Tenth Circuit's decision properly applies a prior decision of this Court and is consistent with the Utah Supreme Court, and does not conflict with a decision of another court of appeals.

II. Whether Petitioners have presented compelling reasons to grant the Petition where the Tenth Circuit, the district courts, the bankruptcy court, the Utah state trial courts, the Utah Court of Appeals, and the Utah Supreme Court have determined that Petitioners lack standing to usurp a bankruptcy trustee.

III. Whether Petitioners have presented compelling reasons to grant the Petition where the Tenth Circuit, the district courts, and the bankruptcy court, consistent with the decisions of the Utah Supreme Court, Utah Court of Appeals, and Utah state trial courts, have factually determined that the bankruptcy petition was properly authorized and filed.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Granite Stone, L.C. is wholly owned by Machinery and Hardware Supply, Inc., none of whose stock is owned by any publicly held corporation. Ray Quinney & Nebeker P.C. is a privately and individually held professional corporation.

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INTRODUCTION

Petitioners' claims have been considered and soundly rejected no less than nineteen times by two bankruptcy courts, two federal district courts, the Court of Appeals for the Tenth Circuit, two Utah state trial courts, the Utah Court of Appeals, and the Utah Supreme Court. Petitioners have presented no "compelling reasons" in support of their petition. *See* Sup. Ct. R. 10. The merits of the claims asserted by Petitioners are in inverse proportion to the amount of litigation Petitioners have generated attempting to convince some court that the claims have any legitimacy.

The Tenth Circuit ruled that the Petitioners' appeals of the cases, for which a writ of certiorari is petitioned, were frivolous and stated that the "odyssey ends in our court." [App. at 21]. Unfortunately, the "odyssey" did not end in the Tenth Circuit. Although one appellant below, Golden Meadows Properties, LLC, accepted reality and did not file or join in the petition for a writ of certiorari, Petitioners persist in their effort to pursue frivolous claims that are without any merit whatsoever and for which they lack standing. Petitioners do not make a serious attempt to carry their difficult burden of demonstrating compelling reasons. The sole reference of Petitioners to a rule 10 standard is that one sentence of the Tenth Circuit opinion is a departure from usual judicial proceedings. [Petition at 8]. Because Petitioners have wholly failed to demonstrate any basis for granting certiorari, the Petition should be denied.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is rife with factual inaccuracies that substantially distort and mischaracterize the record. For example, Petitioners claim that Cari Allen sold her Log Furniture, Inc. stock to Golden Meadows Properties, LLC ("Golden Meadows") on July 21, 2000, and therefore Granite Stone, LC ("Granite") never obtained ownership of the stock at the later conducted sheriff's sale of her stock. [Petition at 3-4]. To the contrary, as Golden Meadows' principal and Cari Allen both testified, and as Golden Meadows' attorney argued, Cari Allen only pledged her stock to Golden Meadows as security for a loan. She remained the sole shareholder of Golden Meadows at the time of the sheriff's sale when her stock was sold. Respondents contest Petitioners' Statement of the Case. The record before the court of appeals in the three cases is 4828 pages. Because Petitioners have egregiously failed to fairly set forth with accuracy the factual record in this case and have grossly misstated the facts, Respondents set forth briefly their own statement of the facts relevant to a consideration of the Petition and to clarify the record.

CLARIFICATION OF THE RECORD

Allen's Ownership of the LFI Stock

On April 2, 2002, Machinery & Hardware Supply, Inc. ("MHS") obtained a money judgment in the principal amount of $17,189.54 in the Third Judicial District Court, State of Utah (the "State Court"), against Log Furniture, Inc. ("LFI") and its sole shareholder, Cari Allen ("Allen"). [10th Resp.

App. at 5-6].[1] On October 22, 2002, LFI filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, case no. 02-37988 (the "Prior Bankruptcy Case"). [10th Resp. App. at 18]. Howard P. Johnson ("Johnson"), a now suspended or disbarred Utah lawyer, represented LFI as debtor's counsel in the Prior Bankruptcy Case. [*Id.*] In LFI's bankruptcy schedules, in its disclosure statement and plan of reorganization, and in Allen's testimony, it was stated and represented repeatedly that Allen was the sole shareholder of LFI. [*See, e.g.*, App. at 2].

The Acquisition of Allen's LFI Stock by Granite

On June 2, 2003, MHS obtained a writ of execution from the State Court with respect to the personal property of Allen and the writ was personally served on Allen on June 17, 2003. [App. at 2]. The praecipe in support of the writ directed the sheriff to execute and levy upon the non-exempt personal property of Allen, specifically including all "right, title and interest that the judgment debtor, Cari Allen, has . . . in any stocks or corporations." [App. at 2]. Allen objected to the levy and execution sale of her personal property and a hearing on Allen's objection was held on July 16, 2003. Allen told the State Court that her stock in LFI "was assigned over two years ago" and requested that the hearing be continued. [10th App. at 206-207].

On July 23, 2003, the State Court conducted the continued hearing on the execution, and also addressed an objection by Golden Meadows regarding Allen's personal interest in the LFI stock. [10th App. at 210-228]. Golden

1. Respondents references are to the record before the Court of Appeals for the Tenth Circuit in No. 05-4228, except for references to the Petitioners' appendix as noted.

Meadows' counsel stated that "although it has an assignment of those stock interests, that does not mean that Golden Meadows owns the stock. It does not but Golden Meadows does have a pledge of stock. . . ." [10th App. at 217-219]. Golden Meadows' counsel reiterated: "we don't dispute the ownership of the stock in Cari Allen but just assert a security interest in the pledge as well as the security interest in the real property." [10th App. at 224-225]. The court considered and denied the objection raised by Golden Meadows, concluding that Golden Meadows had not presented sufficient evidence for the court to conclude that the writ of execution was improper or that it should be stayed, and overruled all objections. [10th App. at 226-227]. The court further concluded that even if Golden Meadows had established (which it did not) a security interest in the property attached pursuant to the writ of execution, then the security interest would not preclude the execution sale. [*Id.*].

Pursuant to the writ of execution and rulings of the State Court overruling the objections to execution, on September 10, 2003, the sheriff conducted an execution sale of all of Allen's interest/shares in LFI and sold them to MHS. [App. at 2]. MHS assigned all of its interest in the ownership interest/shares of LFI to Granite. [*Id.*].

The Filing of the Bankruptcy Case and Subsequent Proceedings

On September 11, 2003, the Prior Bankruptcy Case was dismissed. [10th Resp. App. at 36]. Granite, in its capacity as the sole shareholder of LFI and acting by and through its manager, MHS, authorized the filing of the chapter 7 bankruptcy petition for LFI, which was filed on October 31, 2003, commencing the bankruptcy case from which the

present Petition arises. (the "Bankruptcy Case"). [App. at 4]. Elizabeth R. Loveridge ("Loveridge") was appointed as the initial chapter 7 trustee for LFI in the Bankruptcy Case on or about November 6, 2003. [10th App. at 130]. Loveridge was reappointed as successor trustee on or about May 12, 2004, after the elected trustee, Robert Swan, resigned. [10th App. at 416]. Whichever trustee was serving at the relevant time is referred to as the "Trustee."

On November 7, 2003, Johnson, purporting to act as counsel for LFI, filed a motion to dismiss the Bankruptcy Case. [10th App. at 436]. At a hearing on November 20, 2003, the bankruptcy court denied the motion and ruled, as follows:

> It is the finding of the Court that [LFI] can only act through the Trustee in this Chapter 7 case. If someone wants to claim that there was no authorization for filing the Bankruptcy Petition in the first place, they need to claim it. They need to claim it in their own name and show why. The Motion will be denied. [10th App. at 260-261].

On December 1, 2003, Golden Meadows filed its motion to dismiss the Bankruptcy Case, and on December 8, 2003, filed its "Second Amended Motion" to dismiss the Bankruptcy Case (collectively, hereinafter, the "Amended Motion to Dismiss"). [10th Resp. App. at 105-112, 154-166]. Johnson, purporting to act for LFI or its "management," filed a memorandum in support of the Amended Motion to Dismiss. [10th Resp. App. at 113-142]. Voluminous pleadings and documents were submitted to the bankruptcy court as evidence in support of or in opposition to the Amended Motion to Dismiss which are contained in the record of 4828 pages. On January 5, 2004, the bankruptcy court conducted

a hearing on the Amended Motion to Dismiss and at the conclusion of the hearing ruled, as follows:

> The court finds that authorization to file a bankruptcy petition is given by the Nevada statute to the shareholders. *It's uncontested that the sole shareholder of the corporation [Granite] having executed on the stock did vote in favor of authorizing filing of the bankruptcy petition.* That is clear authority for the Nevada court. Court finds that the filing is valid and the motion to dismiss will be denied. [10th App. at 53] [emphasis added].

The bankruptcy court's written order respecting the January 5, 2004 ruling was entered on March 30, 2004 (the "March 30 Order"). [App. at 1-4]. As set forth in the March 30 Order, the bankruptcy court determined that Granite was the sole shareholder of LFI on the bankruptcy filing date, that Granite was properly authorized to file the bankruptcy, and that the filing of the Bankruptcy Case was valid. [*Id.*].[2]

On January 30, 2004, the United States Trustee filed a motion requesting that the bankruptcy court reconsider its ruling denying dismissal, based upon later events in the State Court. [10th Resp. App. at 561-569]. Golden Meadows filed a memorandum joining in the motion. [10th Resp. App. at 570-600]. The bankruptcy court conducted an evidentiary hearing on the motion, on February 10, 2004, at which numerous parties appeared and stated their positions,

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2. The district court, in denying a motion to withdraw the reference of the Bankruptcy Case, entered an order (Case No. 2:04-cv-00349) on November 12, 2004, which adopted the bankruptcy court's January 5, 2004 ruling. [10th Resp. App. at 704]. No appeal was taken.

including Golden Meadows' counsel and Johnson as counsel for the "management" of LFI. [10th Resp. App. at 601-610]. Allen testified extensively at the hearing. [*Id.*] The bankruptcy court denied the motion, and on March 16, 2004, entered its written order (the "March 16 Order") denying the motion. [10th Resp. App. at 611-614]. No appeal was taken from the March 16 Order. [10th App. 419-423].

On May 24, 2004, Golden Meadows filed yet another pleading requesting that the bankruptcy court dismiss the Bankruptcy Case alleging Granite was not authorized to file LFI's bankruptcy petition. [10th Resp. App. at 615-700]. The bankruptcy court treated Golden Meadows' new filing as a motion to reconsider the March 30 Order, and in a hearing held June 7, 2004, denied the motion. [10th App. at 328-338]. In its detailed ruling stated on the record, the bankruptcy court noted that the facts upon which the March 30 Order was based were "largely contained in the statement of facts" filed by Golden Meadows. [10th App. at 334]. The court's order implementing its June 7, 2004 rulings was entered on June 23, 2004 (the "June 23 Order"). [10th App. at 104]. No appeal was taken from the June 23 Order. [10th App. at 408-09].

Johnson, once more purporting to act as counsel for LFI, commenced an adversary proceeding from which this Petition arises by filing a complaint against Granite, and MHS, their principal and attorneys, and the Trustee on November 7, 2003 (the "Adversary Proceeding"). [10th App. at 436]. An amended complaint was later served adding Golden Meadows as a plaintiff. [10th App. at 150]. The complaint and amended complaint sought damages and other relief against the defendants for their alleged wrongdoing in filing the Bankruptcy Case. The bankruptcy court dismissed the

Adversary Proceeding, including the complaint and amended complaint, with prejudice by Order dated April 20, 2004. [10th App. at 5-6].

On March 8, 2004, Johnson, again purporting to act for LFI but this time joined by Allen, purportedly as a *pro se* litigant, filed a new complaint in the State Court naming Respondents herein as defendants. [10th App. at 297]. The claims asserted were substantially similar to, and arose from substantially the same facts and circumstances, as those asserted in the Adversary Proceeding. Defendants removed the new State Court action (the "Removed Action") in its entirety to the bankruptcy court pursuant to 28 U.S.C. §1452(a), and then moved to dismiss the complaint. The bankruptcy court by order dated July 28, 2004 (the "July 28 Order") dismissing with prejudice all claims of LFI brought by Johnson and all claims of Allen "which arise from, arise in, or relate to" the filing of LFI's chapter 7 bankruptcy case, based in part on the bankruptcy court's prior rulings and orders determining that LFI's bankruptcy case was properly filed by Granite. [App. at 7-9]. The remaining claims of Allen, if any, were remanded to the State Court and then dismissed with prejudice by the State Court. [10th App. at 139]. The Utah Court of Appeals summarily dismissed Allen's appeal [10th App. at 146] and the Utah Supreme Court denied certiorari. [10th Resp. App. at 706-708].

Allen, and Johnson still purportedly acting for LFI, appealed the bankruptcy court's July 28 Order partially dismissing the Removed Action to the district court, and the defendants moved for summary dismissal. The federal district court entered an order dated November 4, 2004 dismissing the appeal based on Johnson's and Allen's lack of authority and standing and affirming the bankruptcy court's order dismissing the complaint. [App. at 10-11].

Although no party filed a timely appeal from the order entered by the State Court which overruled the objections to MHS's execution on Allen's stock and permitted the execution to proceed, Allen did appeal a separate order of the State Court entered on August 4, 2004, which vacated a pre-trial order on issues respecting Granite's ownership of the LFI stock. [10th App. at 120]. The Utah Court of Appeals summarily dismissed Allen's appeal, holding: "Although Allen was once the sole owner of the LFI stock, she no longer had any interest in the stock as of September 2003 at the latest, when the stock was sold at an execution sale." [10th App. at 128-129]. Thus, the Utah Court of Appeals reached the same result as the bankruptcy court in ruling that any ownership interest Allen had in LFI's stock was sold to Granite at the September 2003 execution sale. The Utah Supreme Court denied Allen's petition for writ of certiorari. [10th App. at 383]. Undaunted, Allen filed a rule 60(b) motion in the state trial court to vacate the execution order. By order of September 1, 2005, that motion was denied. Allen appealed and the Utah Court of Appeals affirmed, and the Utah Supreme Court denied certiorari.

Petitioners and Golden Meadows appealed to the Tenth Circuit from the dismissal of the two adversary proceedings and the denial of their motions to dismiss the bankruptcy case. The Tenth Circuit issued a consolidated opinion, stating that the appeals were frivolous, dismissing LFI's (through Drage) and Allen's appeals for lack of standing, and affirming the decisions against Golden Meadows. Although the lower courts ruled that only the Trustee had standing to assert claims for LFI and that attorney Nathan Drage could not, Drage persists without authority in his attempt to raise claims of LFI in the Petition, as does Allen.

REASONS FOR DENYING THE PETITION

The Petitioners raise amorphous issues to avoid review of their lack of standing. Cari Allen, neither individually nor as a former officer, former shareholder, or former director of the debtor, has standing to continue this over litigated case. The Petition presents no compelling reason to invoke the discretionary jurisdiction of this Court.

I. Applying this Court's *Weintraub* decision, Petitioners had no standing once the chapter 7 bankruptcy case was filed, because the corporate debtor is managed only by the bankruptcy Trustee

Johnson repeatedly and erroneously claimed before the bankruptcy court, the federal district courts, the state trial courts, the Utah Court of Appeals, and the Utah Supreme Court, in numerous related proceedings that he was filing papers and appearing for and on behalf of LFI or LFI's "management," ostensibly Allen. Drage continued the error before the Tenth Circuit and before this Court. The Bankruptcy Court properly ruled that Johnson and Allen have no authority or standing to assert claims on behalf of LFI.. The district court in four orders correctly affirmed that ruling, [App. at 10-19], as did the Tenth Circuit. [App. at 19-25]. Neither Johnson nor Allen, LFI's former owner, former director and former officer, nor LFI's purported current counsel, Drage, has any legal authority to represent or take positions on behalf of the corporate entity, LFI, or its present "management" (which is the Trustee in bankruptcy). Similarly, none of Johnson, Allen or Drage has any legal authority to assert claims for damages that belong to LFI's bankruptcy estate or to file claims or appeals relating to those claims or to file this petition.

LFI is a corporation and has been a chapter 7 debtor in bankruptcy since the Petition Date. When a corporation becomes a chapter 7 debtor (and, similarly, when a trustee is appointed for a corporation in a chapter 11 case), a bankruptcy trustee is appointed to take control of all of the corporation's property, including all rights and causes of action, and the corporate debtor's former management and directors are "completely ousted." *See*, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348-54 (1985). *See also* 11 U.S.C. §323(a) (the bankruptcy trustee is the authorized "representative of the estate").

Johnson clearly did not – and Drage does not – represent the Trustee and therefore they do not represent LFI or its bankruptcy estate. Thus, Johnson and Drage either have had no client in this case, or their client is really Allen in her individual capacity. None of Johnson, Drage or Allen is an authorized post-bankruptcy filing representative of LFI, and neither Johnson or Drage nor Allen is LFI's post-petition "management." As of the Petition Date, the Trustee is the "management" of LFI, and the Trustee and her appointed counsel are the only authorized representatives of LFI. The Trustee did not file the Adversary Proceeding or the Removed Action asserting claims of LFI against the Respondents, and the Trustee did not appeal the orders dismissing those alleged claims. Allen has no standing because she is no longer a shareholder, officer or director.

Notwithstanding unstayed court orders to the contrary, Johnson, Drage and Allen argue that LFI holds claims, rights and interests that are not part of LFI's bankruptcy estate. Their argument is wrong, and results from their failure to recognize the significant differences between individuals and corporations in chapter 7 bankruptcy cases. An individual

who files a chapter 7 case obviously continues to have a separate existence – along with certain rights, exempt property, liabilities and privileges – apart from his or her bankruptcy estate controlled by the trustee, but a corporate entity in a chapter 7 bankruptcy case does not – a corporate bankruptcy estate is coextensive with the corporate debtor. Thus, while an individual debtor may engage separate counsel to defend his or her interests that are distinct from the interests of the trustee and the property of the bankruptcy estate, a corporate debtor in bankruptcy is an "inanimate entity" that has no separate existence and no rights, claims, privileges, or interests other than those controlled exclusively by the bankruptcy trustee. *See Weintraub*, 471 U.S. at 348-53; *see also Foster v. Hill (In re Foster)*, 188 F.3d 1259, 1267 (10th Cir. 1999) (recognizing that "while a trustee may control a corporate debtor as would its prebankruptcy management," a bankruptcy trustee does not control an individual debtor).

This Court's opinion in *Weintraub* cogently resolved and explained the nature and status of a corporate debtor in a chapter 7 bankruptcy case. Although the specific issue was whether the chapter 7 trustee could waive the corporate debtor's attorney/client privilege, this Court's detailed reasoning and thorough analysis have broad application. A corporation is an inanimate entity that can act only through its authorized agents. *Weintraub*, 471 U.S. at 348. Outside of a bankruptcy proceeding, a corporation's management authority normally is exercised by its officers and directors. *Id.* at 348-49. Bankruptcy causes "fundamental changes in the nature of corporate relationships." *Id.* at 355. The Bankruptcy Code vests the bankruptcy trustee with wide-ranging management authority to control a corporate debtor. *Id.* at 351-52. In bankruptcy, the powers of the corporate debtor's pre-bankruptcy directors and officers are "severely

limited" to turning over the corporation's property to the trustee and providing certain information. *Id.* Bankruptcy Code provisions and legislative history indicate that Congress intended the bankruptcy trustee to assume control of a corporate debtor and that the debtor's directors would be "completely ousted." *Id.* at 352-53. Accordingly, for a corporation in a chapter 7 case, the bankruptcy trustee is the authorized agent and hence the corporation's management. *Id.* at 352-54.

This Court also recognized in *Weintraub* the distinction between individual and corporate bankruptcy debtors is important. *See id.* at 356. The distinction is one that the Petitioners persistently ignore.

Correctly applying the *Weintraub* reasoning in a bankruptcy appeal, a district court flatly rejected arguments very similar to those made by Appellants. In *In re Sandra Cotton, Inc.*, 87 B.R. 272 (W.D.N.Y. 1988), an attorney retained by the corporate debtor's principal attempted to appear on behalf of the corporation, arguing that he had "the right to represent the ongoing 'residue' of the corporation which will remain after the bankruptcy has ended." 87 B.R. at 274. The court framed the issue as "whether anyone besides the Trustee in Bankruptcy can proceed on behalf of and represent the debtor corporation." *Id.* The court reasoned that "[p]ursuant to 11 U.S.C. §727(a)(1) only an individual can be granted a discharge in bankruptcy, and it thus appears that there would be no 'residue' of the corporation to be represented or protected by someone other than Trustee." *Id.* The court further explained, citing this Court in *Weintraub*, that the "power and duties of the Trustee are extensive and he has broad management authority over the debtor." *Id.* The court concluded:

> Pursuant to Bankruptcy Rule 6009 the Trustee is granted complete authority and discretion with respect to prosecuting or defending any litigation involving the bankrupt. He is even vested with control of the corporation's attorney-client privilege. With these general principles firmly in place and having in mind the fact that a bankrupt corporation is never discharged, it is readily apparent to this Court that there is no party other than the Trustee who can represent the debtor corporation on this appeal. *Id.* [Citations omitted]

The holding applies equally in the present case, consistent with this Court's decision in *Weintraub*.

Even if LFI as a corporate entity were not controlled exclusively by the Trustee, all of LFI's property interests, including any and all claims or causes of action it may have against others, would still belong exclusively to LFI's bankruptcy estate under the exclusive control of the Trustee for the benefit of LFI's creditors. Section 541(a) of the Bankruptcy Code provides that "all legal or equitable interests of the debtor in property" as of the bankruptcy petition date become property of the bankruptcy estate. 11 U.S.C. §541(a). Property of the estate clearly includes claims and causes of action. *See, e.g., Sender v. Simon*, 84 F.3d 1299, 1305 (10th Cir. 1996) (the §541(a) definition of estate property "includes causes of action belonging to the debtor at the commencement of the bankruptcy case"); *Delgado Oil Co. v. Torres*, 785 F.2d 857, 860 (10th Cir. 1986) ("The §541 estate, thus, includes any right of action the debtor corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director. The trustee in bankruptcy succeeds to that right. Its

nature is derivative."); *First Sec. Bank of Utah, N.A. v. Gillman*, 158 B.R. 498, 505 (D. Utah 1993). *See also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 367, reprinted in 1978 U.S.C.C.A.N. 5963, 6323 (under §541 a debtor's bankruptcy estate "will include choses in action and claims by the debtor against others").

Accordingly, any causes of action belonging to LFI on the Petition Date became property of LFI's bankruptcy estate on the Petition Date and are under the exclusive control of the Trustee. Moreover, even alleged causes of action belonging to LFI that arose *after* the Petition Date are under the exclusive control of the Trustee. Pursuant to 11 U.S.C. §541(a)(7), "[a]ny interest in property that the estate acquires after the commencement of the case" is included as property of the debtor's bankruptcy estate. Petitioners steadfastly refuse to accept the factual findings of no interest and contemptuously ignore the legal conclusions of lack of standing.

II. The federal and state courts' determinations of the propriety of the bankruptcy filing are consistent with the decisions of this Court and the courts of appeals.

Petitioners once more incorrectly argue, as they unsuccessfully did before all the courts below as well as before the Utah trial and appellate courts, that even if Granite was the sole shareholder of LFI at the time it filed the LFI bankruptcy petition, Granite had no authority as a shareholder to file the petition because management was vested in the board of directors. Hence, Petitioners suggest that this Court review misapplication of a properly stated rule of law. This argument raises nothing more than a routine question of Nevada state law and was correctly rejected by the bankruptcy

court, the district court, the Tenth Circuit, and the Utah state trial and appellate courts.

As the lower courts correctly determined, Nevada law permits any action to be taken by written consent of the shareholders without a meeting that could be taken at a meeting. *See*, Nev. Rev. Stat. §§78.320, 78.325 and 78A.070. Moreover, §2.8 of Log Furniture's By-Laws also provides that any action that may be taken by shareholders at a meeting may be taken by written consent of the shareholders without a meeting: "Any action which may be taken at a meeting of the Shareholders may be taken by written consent without a meeting if such action is taken in conformance with the Nevada Corporations Code." [Log Furniture By-Laws §2.8 at 12]. It is indisputable that Granite as the sole shareholder of LFI properly took shareholder action to authorize the filing of the bankruptcy petition by written consent:

> IT IS HEREBY RESOLVED that David Harris, who is an officer of Machinery and Hardware Supply, the managing member of Granite Stone, LC, is hereby authorized to sign a voluntary petition in bankruptcy under Chapter 7 of the United States Bankruptcy Code on behalf of [LFI] in the United States Bankruptcy Court for the District of Utah, and to sign and execute any other documents that may be necessary in connection therewith. . . . [10th App. at 183]

The cases cited by Petitioners do not support their position that as the sole shareholder Granite had no authority to authorize the filing of the bankruptcy petition. *Keenihan v. Heritage Press, Inc.*, 19 F.3d 1255 (8th Cir. 1994), which Petitioners mischaracterize as "an action amazingly similar

to the present case" [Petition at 15], involved far different facts. In *Keenihan*, the pledgee of the majority of the corporate stock had the right to vote the stock upon default. The state court had entered a temporary restraining order that the pledgee had the right to control management of the corporation and impliedly ruled that the pledgee had the right to vote the stock. Thus, because the pledgor had no right to vote the stock, he had no authority to vote the stock to authorize the bankruptcy filing.[3] In stark contrast, in the present case, although Golden Meadows had a pledge of stock as security for its loan, Golden Meadows did not have the right to vote the stock. Granite obtained the right to vote the stock when it obtained ownership of the stock (including voting rights) and as the sole shareholder voted to authorize the bankruptcy filing.

Chitex Comm., Inc. v. Kramer, 168 B.R. 587 (S.D. Tex. 1994), cited by Petitioners, is also easily distinguished. A receiver was appointed in a divorce action with full ownership of 100% of the corporate stock and full power of control of the corporation. Thus, the court ruled that the husband as former president of the corporation had no authority to file the bankruptcy proceeding for the corporation.

Petitioners cite cases for the proposition that the power to manage a corporation resides in the board of directors. [Petition at 16]. None of these cases involved a situation where a sole shareholder in accordance with the provisions of applicable state law gave written consent for the filing of a bankruptcy petition, and are not on point. For example, in

3. Significantly, and contrary to Petitioners' argument, this opinion recognizes the authority of shareholders under state law to authorize the filing of a bankruptcy petition.

Price v. Gurney, 324 U.S. 100, 65 S. Ct. 513 (1945), an individual who owned seven shares of stock of a corporation and who purported to act as agent for other stockholders filed a bankruptcy petition in the name of the corporation. This Court rejected the argument that because the directors had allegedly breached their trust and committed acts against the shareholders' interests, that the shareholders had a right to bring the bankruptcy proceeding as a derivative action on behalf of the corporation under the rules applicable to derivative actions.

Petitioners defiantly contend, incredibly enough, that Granite never acquired ownership of LFI's stock because that stock was sold to Golden Meadows when Golden Meadows loaned money to LFI in July 2000. Petitioners base this argument on printed language appearing on the back side of the stock certificate pledged by Allen for the loan which states that "I hereby sell, assign and transfer unto Golden Meadows ... 1,000,000 shares represented by the within certificate." Petitioners are not being candid with the Court. This argument was contrary to the clear testimony of Allen and Golden Meadows' principal and the argument of Golden Meadows' counsel and was rejected by each of the lower courts (as well as the Utah trial and appellate courts).

As the lower courts properly found, the stock certificate was simply pledged by Allen for a loan and was not sold to Golden Meadows. Indeed, in numerous pleadings and other documents filed in the Prior Bankruptcy Case during late 2002 and 2003 (years after they now claim Golden Meadows acquired ownership of the LFI stock on July 21, 2000), Allen and LFI's counsel represented that Allen was the sole shareholder of LFI.

Moreover, at the July 23, 2003 hearing in State Court – three years after Petitioners now claim Golden Meadows

acquired ownership – Golden Meadows' counsel, represented to the State Court that Golden Meadows did not own the LFI stock, but only had a pledge of that stock. Counsel stated "although [Golden Meadows] has an assignment of those stock interests, that does not mean that Golden Meadows owns the stock. It does not, but Golden Meadows does have a pledge of the stock. . . ." Counsel continued that "[w]e don't dispute the ownership of the stock in Cari Allen but just assert a security interest in the pledge. . . ." In addition, Golden Meadows' principal, testified at the November 7, 2003 hearing that the pledge agreement and transfer of the stock certificate did not transfer ownership of the stock from Allen to Golden Meadows, but simply constituted a pledge of the stock to secure the loan by Golden Meadows.

Likewise, Allen herself testified that as of October 28, 2002 – over two years after she now argues Golden Meadows acquired ownership of the stock – she owned 100% of the stock of LFI.

Petitioners' attempt to change their position, ignoring their prior testimony and argument, is disingenuous and was correctly rejected by the lower courts.

CONCLUSION

It is axiomatic that this Court's review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari should be granted only for compelling reasons. However, this matter presents no conflict with another United States court of appeals or a state court of last resort. This matter does not present an important unsettled federal question. The Petition does not call for the exercise of this Court's supervisory powers because none of the lower federal or state courts, in twelve separate appeals and three certiorari

petitions to the Utah Supreme Court and before three different trial judges, has departed from the accepted and usual course of judicial proceedings.

What this petition presents are: (1) allegations of erroneous factual findings by the bankruptcy court and Utah trial courts that Granite Stone acquired all right, title and interest in 100% of the common stock of LFI, and (2) legal theories that, in derogation of the bankruptcy Trustee, a former officer and director of a debtor corporation may continue frivolous litigation as either the debtor or its representative. Ultimately, Petitioners ask this Court to ignore twelve prior appellate decisions and review factual findings that Cari Allen, either individually or through her charade as a former governing officer or director of the debtor, has no standing. Because this case presents no compelling reason for further review, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD D. BURBIDGE
STEPHEN B. MITCHELL
BURBIDGE & MITCHELL
215 South State Street
Suite 920
Salt Lake City, UT 84111
(801) 355-2341

Attorneys for Steven Call, and Ray Quinney & Nebeker P.C.

STEVEN T. WATERMAN*
RAY QUINNEY & NEBEKER P.C.
36 South State Street
14th Floor
Salt Lake City, UT 84145-0385
(801) 532-1500

Attorneys for Granite Stone, L.C., Machinery & Hardware Supply, Inc., and David Harris

* *Counsel of Record*